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Strategic Aspects of Voluntary Disclosure Programs for Corruption Offences

- Towards a Design of Good Practice -

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Abstract

Even though high penalties for corruption offences have a deterrent and preventive effect, they also entrap bribe-takers and bribe-givers in their corrupt relationship. Moreover, pending penalties can be misused to make threats against opportunistic behavior and can thus stabilize risky bribe agreements. This paper shows how voluntary disclosure programs can be strategically applied to break the 'pact of silence' and to promote opportunism in a targeted way. Against this background the paper studies the leniency provisions in the penal codes of 56 countries. The analysis reveals deficiencies in the utilization and in the design of voluntary disclosure programs for corruption offences.

JEL Classification: K14, L14

Keywords: Corruption, Criminal Law, Leniency, Self-Reporting, Voluntary Disclosure Program

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1 Introduction

Until the 1970s corruption was a topic hardly discussed. In fact, it is only since the 1990s that the anti-corruption movement has gained significant momentum, spurred by myriad media reports, articles and scientific studies from different disciplines all showing the detrimental effects of corruption. A vast number of researchers as well as of practitioners all over the world have concentrated their intellectual efforts on unearthing the causes and consequences of corruption, on analyzing the mechanisms of corruption as well as on devising the means to fight it. Our knowledge on corruption and anti-corruption is thus increasing at a remarkable speed. And as reform ideas are tested throughout the world and experiences are rapidly and broadly exchanged, significant steps in establishing good practices have been made.

Most attempts towards curbing corruption entail repressive and preventive measures as well as the fostering of transparency. However, these avenues towards anti-corruption have various serious limitations, (Lambsdorff and Nell 2006). Given these drawbacks, novel approaches towards fighting corruption have been explored. Concepts of the new institutional economics, for instance, posit that reform measures should promote betrayal among corrupt parties, destabilize corrupt arrangements, disallow immoral contracts to be legally enforced, and impair the operation of corrupt intermediaries, (Lambsdorff, Schramm and Taube 2005; Lambsdorff 2007). Moreover, representatives of industrial organization economics and game theory have recently shed light on new ways of tackling corruption, also including the optimal design and implementation of leniency programs. For a review of the relevant literature see for instance Gneuß (2002), Buccirossi and Spagnolo (2005, 2006) and Spagnolo (2006).

Offering captured wrongdoers lenient treatment in exchange for information valuable to investigation and prosecution has been a standard tool for centuries. Plea bargains, for example, have for a long time been an important element of investigation and prosecution. They entail an agreement in which the detected and indicted person agrees to plead guilty or no contest, and in some cases also agrees to provide testimony against another person. In return the person is promised by a prosecutor a mitigated punishment or is charged with a lesser crime. Accordingly, plea bargains are applied at the time an offender is detected.

Voluntary disclosure programs differ from plea bargains and similar post-detection exchanges in two important aspects. First, they are directed at wrongdoers who have not yet been exposed. In Germany, for instance, a tax evader is exempted from criminal proceedings if he turns himself in prior to detection. Similarly, a voluntary disclosure program for corruption offences grants leniency if a bribe-taker or bribe-giver self-reports his offence before detection. Active repentance, expressed by the act of self-reporting, is thus the primary circumstance removing criminal liability. In contrast, a plea bargain is struck to reduce the costs of prosecution and conviction and sometimes to obtain evidence against other offenders. Active repentance does not play a crucial role.

Second, voluntary disclosure programs grant a reduction in the applicable penalty not on a case by case, crime by crime basis. Rather, leniency is conceded to anybody who is in a certain codified situation and meets the conditions that the program sets, (Spagnolo 2006: 7). Leniency is thus universal and automatic. The reduction in the penalty is definitely bestowed and not subject to discretion by prosecutors or judges, as in a plea bargain.

For three primary reasons voluntary disclosure programs may prove to be more adequate for fighting corruption than post-detection exchanges such as plea bargains, (Lambsdorff and

Nell 2007: 8). First, voluntary disclosure programs codify the extent of leniency and thus reduce legal uncertainty. Consequently, they give wrongdoers an 'exit option' that they can definitely rely on and thus promote self-reporting. The same does not hold true for plea bargains since their credibility and reliability may succumb to prosecutors' and judges' discretion.

This is corroborated by a recent case involving German soccer referee Robert Hoyzer. After having been detected in 2005 and indicted for fixing soccer games, Hoyzer struck a plea bargain with the prosecuting authorities and provided testimony against some members of the German-Croatian gambling mafia. However, the judge sentenced Hoyzer to a higher prison term than the prosecution in fact had asked for in its final plea.[1]

Second, prosecutors and judges might themselves be susceptible to misusing their discretionary powers for private benefit. In the worst case this would increase corruption also in the judicial system.[2] Voluntary disclosure programs, however, significantly strip judges and prosecutors of their discretionary powers and therefore also of the possibility to administer justice corruptly. Third, voluntary disclosure programs can be designed such to reflect the unique nature of corrupt deals and to exploit their Achilles heel.

Corrupt deals are afflicted with several risks. Corruption requires cooperation among several agents to perform the illegal activity. The prerequisite of cooperation in turn implies a governance problem, (Spagnolo 2006: 4). In particular, corrupt crooks have to fear that they will be cheated by their counterparts. For instance, a firm bribing a public official to be awarded a lucrative contract may in the end see the official awarding the contract to a competitor. Similarly, the public official may be cheated by the firm. After he awarded the contract the firm rejects payment, (Lambsdorff and Nell 2007).

That corrupt actors oftentimes do not get what they were promised is corroborated by a recent case involving German-Canadian lobbyist Karlheinz Schreiber. In 1993 and 1994 Schreiber, who is still fighting his extradition from Canada to Germany, where he faces tax evasion, bribery and fraud charges, paid CAD 300,000 to former Canadian Prime Minister Brian Mulroney. In March 2003 Schreiber sued Mulroney, alleging that he failed to provide any services for the CAD 300,000 he was paid. Schreiber said that he hired Mulroney to help establish a Quebec factory to build light-armored vehicles for German behemoth Thyssen AG but that Mulroney failed to advance the project. Moreover, Schreiber claimed that Mulroney "further defaulted on his promise" to promote his pasta business, Reto Restaurant Systems International. In July 2007 the Superior Court in Ontario acceded to Schreiber's claim and ordered Mulroney to pay Schreiber CAD 470,000 (300,000 plus interest) since he did not meet the time limit for filing an objection.[3]

Normally, however, corrupt actors cannot solve their disputes through courts or arbitration councils since they have to fear criminal proceedings. Thus, they have to look for alternative

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[1] See Pressemitteilung des BGH Nr. 174/2006, http://www.hrr-strafrecht.de/hrr/pm/2006/174-2006.html, download on 26 November 2007.

[2] For a comprehensive review of corruption in judicial systems see Global Corruption Report (2007).

[3] See Welt Online (28 July 2007: "Schreiber bekommt Schmiergeld zurück"), http://www.welt.de/welt_print/article1061283/Schreiber_bekommt_Schmiergeld_zurck.html, download on 27 November 2007; CityNews (14 November 2007: "Brian Mulroney, Karlheinz Schreiber Case Chronology"), http://www.citynews.ca/news/news_16761.aspx, download on 27 November 2007.

mechanisms to avoid opportunism and to enforce their deals. For instance, corrupt partners oftentimes integrate vertically to form a new company with common ownership and control; or firms hand out put or call options as bribes instead of direct monetary payments in order to ensure compliance, (Lambsdorff 2002). In many cases social ties and cohesion between corrupt actors play an important role for enforcement as well, (Kingston 2007). And in rougher environments opportunism by either party may be cut off by threats to life or physical condition, backed, for instance, by organized crime groups, (della Porta and Vanucci 1999: 232-236; Gambetta 1993).

Another fundamental feature of corruption is that those involved automatically end up having information on each others' misdemeanor such as on the initiation of the corrupt deal, its design, the payment schemes and where the money or the valuables can be found, (Spagnolo 2006: 4). Therefore, if a deal turns sour or runs the risk of being detected, each party has to fear that its counterpart will reveal these pieces of information to the prosecuting authorities in exchange for a mitigated punishment.

For example, the largest company in France, Elf Aquitaine, allegedly set up an internal financial network aimed at providing funding for corrupt political purposes. This so-called "Investment Board" consisted of relatives and friends of the chairman of the board. This institution was well established, and succeeded for a while. Yet the booting out of one member put an end to its operation. The outcast took revenge, and reported operations of the network. Clearly, some type of conflict can stimulate one party to take revenge, or to prefer honesty to involvement in illegal transactions, (Lambsdorff and Nell 2007).

Voluntary disclosure programs can be designed such as to exploit these Achilles heels of corruption. In particular, if leniency is granted to those who self-report only at a certain stage of a corrupt deal, the trust in mutual compliance and silence among corrupt partners can be severely shattered. Moreover, if voluntary disclosure programs require testimony to be provided against accomplices, their power is further strengthened.

2 Strategic Aspects of Voluntary Disclosure Programs – Benchmark Case Turkey

The Turkish Penal Code well serves as a benchmark for illustrating the strategic aspects of voluntary disclosure programs. Active and passive bribery are criminalized pursuant to Article 252. Subsections (1) and (3) are of relevance[4]:

> (1) Any public officer who receives a bribe shall be sentenced to a penalty of imprisonment for a term of four years to twelve years. The person giving the bribe shall be sentenced as if he were a public officer. Where the parties agree upon a bribe, they shall be sentenced as if the offence were completed. […]
>
> (3) A bribe is defined as the securing of a benefit by a public officer by his agreeing with another to perform, or not to perform, a task in breach of the requirements of his duty.

[4] Translations in this section were provided by Dr. Vahit Biçak, Associate Professor at the Faculty of Security Sciences at the Police Academy, Ankara, Turkey. […] indicates omissions.

The offence of bribery is completed at the time a public official receives or agrees to receive a bribe. For Article 252 (1) to take effect, there is no need of the public official actually to perform the task demanded by the bribe-giver. Accordingly, a bribe-giver is punished at the time he gives or offers a bribe. It is again not a prerequisite that the public official thereupon performs the demanded task. The corresponding voluntary disclosure programs are codified in Article 254 (1) and (2):

> (1) Where, prior to the commencement of investigation, the person in receipt of the bribe presents […] such, in its original state, to the authorities, no penalty shall be imposed for the offence of bribery. Where, prior to the commencement of an investigation, a public officer who, after having agreed to receive a bribe, informs the authorities of such, no penalty shall be imposed.
>
> (2) Where, prior to the commencement of investigation, a person who offered and gave a bribe to a public officer informs the authorities responsible for investigation of such, no penalty shall be imposed and the bribe he gave to the public officer shall be taken from the public officer and handed back to him.

Article 254 is an example of a voluntary disclosure program. It requires self-reporting prior to detection and investigation. Moreover, it is codified, automatic and public. Anyone who commits a crime pursuant to Article 252, but fulfils Article 254's requirements, is granted leniency to the extent formulated in Article 254. However, the voluntary disclosure program contains several strategic weaknesses that may impede its effectiveness in curbing corruption.

Weakness 1: Supplying a bribe-giver with a credible threat against opportunism

According to Article 254 (2) no punishment is imposed on a bribe-giver if he notifies the authorities before the commencement of investigation. Such an exit option is important for extracting information indispensable for detection, investigation, prosecution and conviction. Moreover, it is important for preventing a bribe-giver from becoming entrapped in his criminal career. However, leniency must be granted in a strategic way so as not to run the risk of assisting corrupt actors with enforcing their illicit deals. To illustrate this, let us consider the following exemplary case (Figure 1).

The government invites tenders for a contract involving the construction of several apartment buildings. The public official (E) is commissioned by the government to solicit and evaluate the bids. The private firm is one of the bidders. Its director (D) is in charge of preparing the bid. In the course of the bidding process D gives E a bribe and expects E to award the contract.

As Figure 1 illustrates, D can be cheated by E insofar as E does not award the contract after having received the bribe from D. The risk of such acts of double-dealing on part of E is a good thing because it makes corruption a troublesome business for D, (Lambsdorff and Nell 2007). For example, if Karlheinz Schreiber had known that Brian Mulroney did not intend to wield his power for promoting both the Thyssen factory and his own pasta business, he would most likely not have paid the CAD 300,000 in the first place.

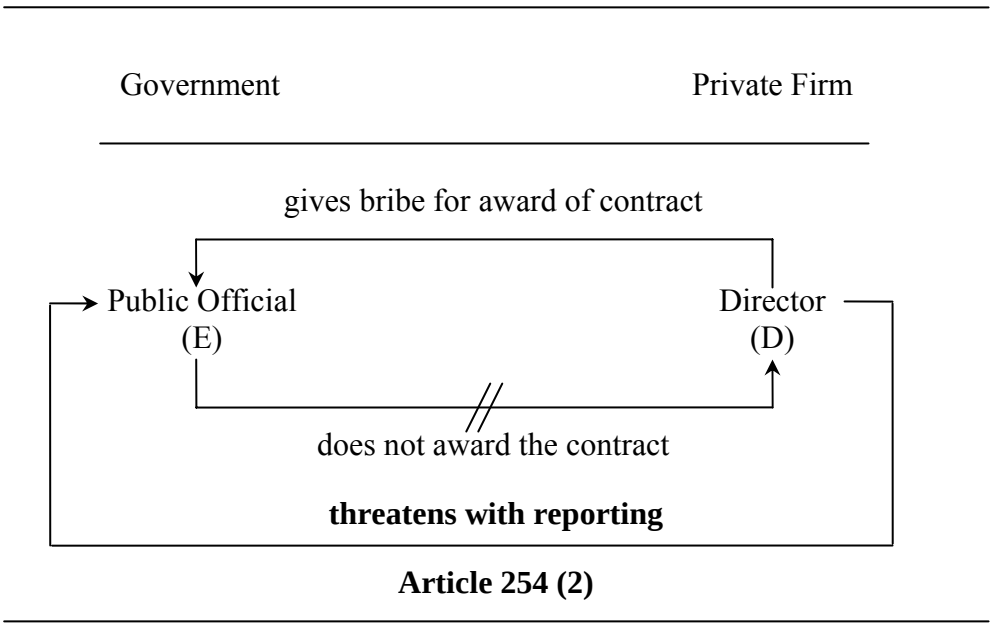

Figure 1

However, Article 254 (2) supplies D with a 'weapon' against potential opportunism. Since exemption from punishment is granted to D at any stage of a corrupt deal as long as he self-reports before the commencement of investigation, he can force E into awarding the contract by threatening to make a report. The threat is credible because Article 252 (1) punishes E once he has agreed to accept or accepted the bribe. The penalty is imposed irrespective of him returning the favor. Hence, if D makes a report, E has to reckon with being subjected to criminal sanctions, while D goes unpunished. By conceding leniency to D at any stage of a corrupt deal, Article 254 (2) thus supplies D with a credible threat that he can misuse for seeing to it that E awards the contract after having taken the bribe.

To eliminate this credible threat, leniency should only be granted to D on condition that he self-reports after E reciprocated the bribe. Besides stripping D of a powerful enforcement mechanism, the voluntary disclosure program would then be designed in a strategic way that undermines both players' trustworthiness. D could no longer credibly promise that he will not report the deal once the bribe (or the offer of such) has been reciprocated by E. Reckoning with the possibility of being reported if he reciprocates, E would in turn abstain from returning the bribe favor (or the offer of such). The strategic design thus has a dual effect that destabilizes corrupt deals and relationships and may ultimately lead to the entire deal's collapse at the stage of initiation.[5]

Let us look at this against the background of the Mulroney-Schreiber affair and let us assume for a moment that Turkish legislation applies. Schreiber paid CAD 300,000 to Mulroney and expected him to help establish a factory for light-armored vehicles in Quebec operated by Thyssen AG. Moreover, Schreiber wanted Mulroney to promote his private pasta business. But Mulroney allegedly did nothing of the sort. Schreiber could have abused Article 254 (2) to pressure Mulroney into fulfilling his part of the deal. This is because Schreiber would have

[5] See Lambsdorff and Nell (2007) for a formal derivation of this result.

gone unpunished while Mulroney would have faced criminal proceedings pursuant to Article 252 (1). To avoid such abuses of a voluntary disclosure program, leniency should only be granted if Schreiber reported his wrongdoing after Mulroney pulled his strings on Schreiber's behalf.

Consistent with this logic, Article 254 (2) should be reformulated as follows (changes highlighted in italics):

> (2) Where, prior to the commencement of an investigation, a person who offered and gave a bribe to a public officer informs the authorities responsible for investigation of such, *but only after the public officer performed the task in the interest of such person*, no penalty shall be imposed […].[6]

Weakness 2: Supplying a bribe-taker with a credible threat against opportunism

Article 254 (1) grants exemption from punishment at any stage of a corrupt deal as long as E self-reports before investigations have been initiated. E thus has the opportunity to report the deal also after its finalization, i.e. after having reciprocated on the bribe (or on the offer of such). This incentive should clearly be upheld because it produces uncertainty on part of D about not being turned in by E even if the deal has gone through smoothly. Moreover, it gives E the opportunity to escape from a vicious circle of being pressured by D into corrupt deals again and again. Mulroney could have reported the deal with Schreiber even if he had already pulled his political and business strings to promote the Thyssen factory and Schreiber's pasta business. On this account, the formulation of Article 254 (1), sentence one, requires no change.

However, as Figure 2 illustrates, E may also award the contract before actually being paid the bribe. D can now behave opportunistically insofar as not to pay the promised bribe. Article 254 (1), sentence two, equips E with a 'weapon' against such an act of opportunism, though. He can threaten D with reporting the deal and thus ensure D's compliance.

The threat is credible because E is exempted from punishment in case of self-reporting. Moreover, the offering or promising of a bribe already is a punishable act according to adjudication pertaining to Article 252 (2). Hence, D has to reckon with being subjected to punishment, while E goes unpunished.

To strip E of such a credible threat, the voluntary disclosure program should codify that exemption from punishment is granted to E only if the bribe was actually given to him.[7] The formulation in Article 254 (1), sentence two, however, runs counter to this. The well-intended Turkish leniency program may thus be abused by E to put pressure on D to be paid the bribe.

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[6] It is noteworthy that according to Article 254 (2) the bribe is returned to the bribe-giver in case of self-reporting: "…and the bribe he gave to the public officer shall be taken from the public officer and handed back to him". This creates an even stronger incentive for a bribe-giver to report a corrupt deal and further undermines his trustworthiness. However, while a bribe-giver who shows signs of sincere repentance should be granted leniency, he should not be able to seek the law's protection by reclaiming his expenses. Returning the bribe can clearly not be supported. Thus, Turkish legislators should consider eliminating this rider.

[7] See Lambsdorff and Nell (2007) for a formal derivation of this result.

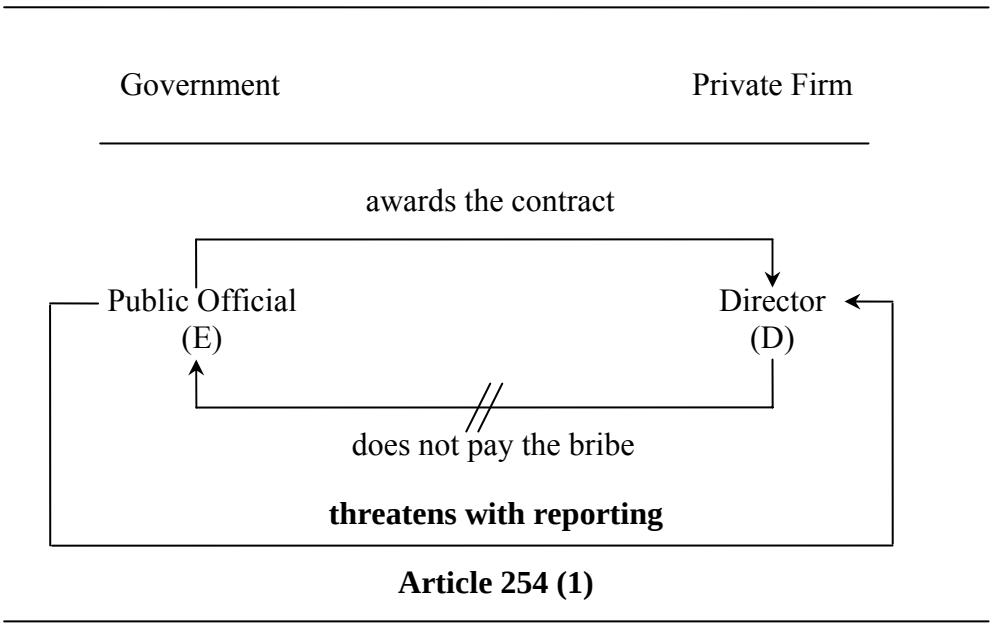

Figure 2

Let us again look at this in face of the Mulroney-Schreiber affair. But let us now assume that Schreiber promised to pay CAD 300,000 once Mulroney successfully wielded his influence to promote the Thyssen factory and his past business. Schreiber could have then cheated Mulroney by failing to make the payment as agreed. Assuming anew that Turkish legislation applies, Mulroney could have misused Article 254 (1) to force Schreiber to pay. Since Schreiber had been on Canadian and German prosecutors' radar for a long time, Schreiber would have likely complied and pay the agreed sum.

On this account, a strategic design would have to encompass the elimination of sentence two of Article 254 (1).

> (1) Where, prior to the commencement of an investigation, the person in receipt of the bribe presents […] such, in its original state, to the authorities, no penalty shall be imposed for the offence of bribery. ~~Where, prior to the commencement of investigation, a public officer who, after having agreed to receive a bribe, informs the authorities of such, no penalty shall be imposed~~.

The voluntary disclosure programs then interact such as to shatter the mutual trust in reciprocity. E has to reckon with being cheated by D and will thus in most instances demand the bribe prior to the award of the contract. D then faces the risk that E does not award the contract, though. Since D is granted leniency only in case E reciprocated, D cannot make sure that E complies as he lacks a credible threat. Moreover, even if E awards the contract, he may self-report at a later stage to avoid punishment. In the end, the circular effects of the voluntary disclosure programs strip both D and E of the trust in reciprocity necessary for striking a corrupt deal.[8]

[8] See Lambsdorff and Frank (2007) for an experimental validation of the results.

3 Policy Recommendations

The United Nations Convention against Corruption (UNCAC) in Article 15 (a) and (b) puts forth recommendations on the criminalization of active and passive bribery.[9] Moreover, Article 37 provides for a guideline for leniency provisions to be considered by signatory and ratifying parties.[10] Against these Articles' background I propose the following voluntary disclosure programs.

Active Bribery

> (1) A person offering, promising or giving, directly or indirectly, an undue advantage to a public official, for the official himself or herself or another person or entity, in order that the official, in the exercise of his or her official duties, act on behalf of the giver of an advantage or another person or entity shall be punished with […].

Voluntary Disclosure Program for Active Bribery

> (2) A person liable pursuant to (1) shall be exempted from punishment if he or she reports to the competent authorities before preliminary proceedings have been taken, if the public official acted on behalf of him or her or another person or entity, and if he or she provides testimony against the public official.[11]

Passive Bribery

> (1') A public official, who, directly or indirectly, solicits, agrees to accept or accepts an undue advantage, for himself or herself or another person or entity,

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[9] Article 15: Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: **(a)** The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; **(b)** The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties. See UNODC (2003: 11)

[10] Article 37: **1.** Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds. **2.** Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention. **3.** Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention. **4.** Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention. **5.** Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article. See UNODC (2003: 19).

[11] Conditioning leniency on actual conviction of the public official would push things too far because prosecutors my fail in achieving it due to random errors or political constraints. However, making testimony a condition for leniency is important to strengthen the risks that self-reporting entail.

in order that he or she, in the exercise of his or her official duties, act on behalf of the giver of an advantage or another person or entity shall be punished with […].

Voluntary Disclosure Program for Passive Bribery

(2') A person liable pursuant to (1') shall be exempted from punishment if he or she reports to the competent authorities before preliminary proceedings have been taken, if the undue advantage was given to him or her, and if he or she provides testimony against the giver of the undue advantage.[12]

Table 1 summarizes the key elements.

Form of Bribery	Elements of Strategic Voluntary Disclosure Programs	
Active Bribery	Leniency is granted only if the bribe was reciprocated	- Leniency is granted in case of self-reporting - Self-reporting is required to encompass testimony
Passive Bribery	Leniency is granted only if the bribe was given and not if the bribe was only promised	

Table 1

It remains questionable whether the solicitation of a bribe should really be exempt from punishment in case of self-reporting. If E solicited the bribe through coercion or intimidation or the threatening with physical harm, I believe that he should not be exempt from punishment. E's self-reporting should then at most be seen as a reason for mitigating his applicable sentence. However, the decision about this should be that of prosecutors and judges as they should be able to weigh the gravity of E's offence against eventual mitigating circumstances such as active repentance.

In less severe instances of solicitation, however, conceding leniency automatically may be reasonable. A reliable backdoor is necessary because otherwise D can in the future turn the tables on E and demand the supply of corrupt services. Without the possibility of being granted leniency in case of self-reporting, E would be entrapped in a long-lasting criminal career. What develops is a vicious circle of mutual dependencies that fosters corruption.

Accordingly, the voluntary disclosure program for active bribery also encompasses cases in which the bribe was solicited. Its formulation implies that D is exempted from punishment only if he reports after E awarded the contract. This may seem strange at first view. However, if leniency is granted at an earlier stage, D is equipped with a credible threat against E who solicits a bribe but does not deliver thereupon.

[12] Again, conditioning leniency on actual conviction of the bribe-giver would push things too far because prosecutors may fail in achieving it due to random errors or political constraints.

In fact, E can continue soliciting bribes from D as long as he does award the contract. He can do so because D cannot escape from this trap as he is only conceded leniency if E awarded the contract. Besides, if E can expect leniency if he self-reports, he can credibly threaten D with reporting unless D does not continue giving bribes. Anticipating this two-sided opportunistic behavior (non-reciprocity and ongoing solicitation), D would likely abstain from ceding to E's demands in the first place.

4 Cross-Section Analysis

This section analyzes the relevant provisions in the penal codes of 56 countries. In 2006, 181 criminal law scholars and anti-corruption practitioners from 100 countries were contacted via e-Mail. The experts were identified by means of Internet research (law faculties of universities and members of bar associations) as well with the aid of the German Development Agency (GTZ) and the International Criminal Defence Attorneys Association (ICDAA).

The experts were described the research project and asked to support it by providing an "up-to-date and official version" of their home country's penal code in English, or in French or Spanish where these are official languages. Of the 181 people contacted 68 replied. 37 provided an English version of their home country's penal code. The remaining 31 experts replied that they were not aware of an English translation of their country's penal code. No one provided either a French or Spanish version. Therefore, further research was conducted at the Max-Planck Institute for Foreign and International Criminal Law (Freiburg, Germany) in December 2006. The Institute's database of approximately 100 penal codes was searched for penal codes available in French or Spanish. 31 penal codes fulfilled the language criterion. However, due to time constraints 15 of the 31 penal codes were randomly selected and translated from French and Spanish into English and entered the study. 3 penal codes were available in English at the Institute and therefore also entered the study. One further penal code was available in English on the Internet.

The countries included in the cross-section analysis are (in alphabetical order): Albania, Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Bolivia, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Burundi, Canada, Chile, China, Colombia, Costa Rica, Croatia, the Czech Republic, Estonia, Ethiopia, Finland, Germany, Honduras, Hungary, Iceland, India, Iraq, Japan, Kazakhstan, Kuwait, Latvia, Macedonia, Malta, Mexico, Moldova, Mongolia, Montenegro, Nicaragua, Nigeria, Panama, Peru, Philippines, Romania, Russia, Senegal, Serbia, Slovakia, Slovenia, Sweden, Tajikistan, Tunisia, Turkey, Ukraine, Uruguay, Uzbekistan.[13]

In the course of the penal codes' analysis it was assessed whether or not active and/or passive bribery are criminal offences (explicit criminalization). If so it was further analyzed whether or not voluntary disclosure programs for these offences exist (codified leniency). Accordingly, a provision was counted as a voluntary disclosure program if it requires self-reporting prior to detection/investigation and if it explicitly relates to active or passive bribery. Thus, leniency provisions that are part of codes of criminal procedure were not counted as they usually do not explicitly relate to active or passive bribery. For the same

[13] Appendix II lists the sections in the respective penal codes. The paragraphs' wording is included in Appendix III, available online at (http://www.icgg.org/downloads/Appendix%20III%20Penal%20Codes.pdf).

reason, provisions in the penal codes' general parts, listing circumstances mitigating liability and punishment, were not counted either.

Even though the exact elements and the degree and type of penalties of the offenses vary, both active and passive bribery are criminalized in all 56 countries (Figure 3). There is no country in the sample criminalizing only active or passive bribery. These results may be subject to a sample selection problem. Some experts may have not provided a penal code if bribery is not criminalized in their respective country. Moreover, some experts may have been averse to providing a penal code if they felt that criminalization of active and passive bribery in their country is insufficient. However, this sample selection problem is to some extent mitigated by the fact that 19 penal codes (34 %) were randomly selected.

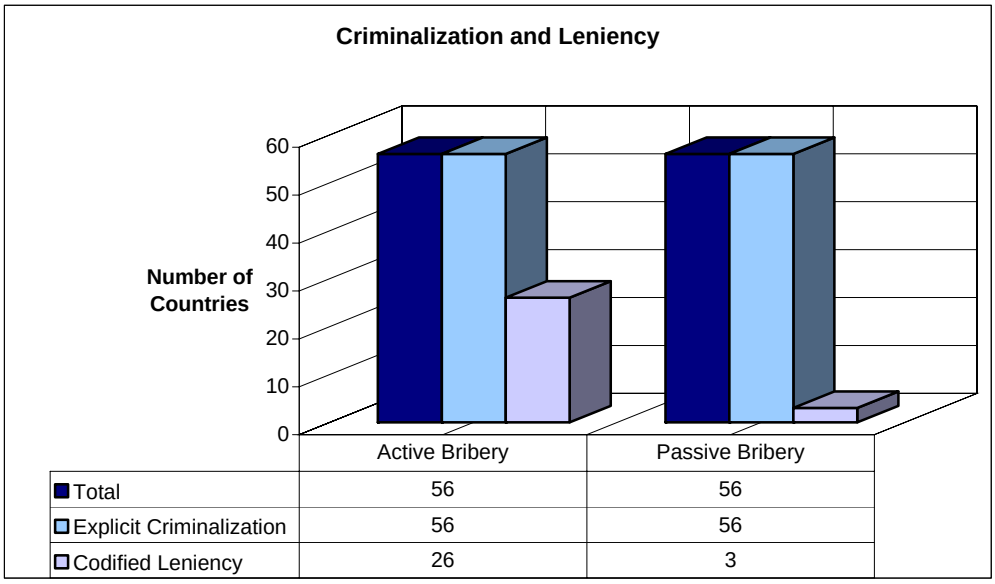

Figure 3

26 of the 56 countries (46%) employ voluntary disclosure programs for active or passive bribery. All of these 26 do so for active bribery. In stark contrast, voluntary disclosure programs for passive bribery exist in only 3 of the 26 countries (18%). This indicates that, if voluntary disclosure programs are employed, they apply mostly to active bribery. Explicitly granting leniency also in cases of self-reporting acts of passive bribery is clearly the exception rather than the rule. However, such an asymmetry may produce negative effects by entrapping public officials in a corrupt career, and if improperly designed, by supplying bribe-givers with a means to enforce corrupt deals.

A potential explanation for this asymmetry, namely that a bribe is oftentimes solicited or extorted and that in these cases leniency ought to be conceded to a bribe-giver, is not strongly supported by the cross-section analysis. Just 7 of the 26 countries grant leniency only in case of solicitation or extortion. All others concede leniency also if a bribe was offered, promised or given on the bribers own accord (see next subsection).

The statistics concerning the voluntary disclosure programs are representative. The experts were told that "the research project involves the analysis of elements of bribery offences". However, they were not told that the analysis would primarily focus on the existence and the design of voluntary disclosure programs pertaining to these offences. Therefore, it can be largely excluded that any expert provided a penal code only if voluntary disclosure programs

exist in it. A sample selection problem seems not to influence the conclusion that voluntary disclosure programs are applied asymmetrically.

Voluntary Disclosure Programs for Active Bribery

The countries employing voluntary disclosure programs for active bribery are Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, China, Croatia, the Czech Republic, Hungary, Iraq, Kazakhstan, Latvia, Macedonia, Moldova, Mongolia, Montenegro, Romania, Russia, Senegal, Serbia, Slovakia, Slovenia, Tajikistan, Tunisia, Turkey, Ukraine and Uzbekistan.[14]

The voluntary disclosure programs of these countries can be divided into three types. The first type grants leniency to a bribe-giver only if he reports and the bribe was solicited or extorted from him (VDP I). Voluntary disclosure does not result in leniency if he offered, promised or gave the bribe on his own accord. This type of a voluntary disclosure program can be found in 7 of the 26 countries (27%): Bosnia and Herzegovina, Croatia, the Czech Republic, Macedonia, Slovakia, Slovenia and Tajikistan. This is a clear deficiency since self-reporting should result in leniency also in case a bribe was offered, promised or given without request in order to promote voluntary disclosure and to destabilize corrupt deals.

The second type concedes leniency if a bribe-giver reports the offering, promising or giving of a bribe or if the bribe was solicited or extorted from him. In case of extortion self-reporting is not necessary (VDP II). This type of a voluntary disclosure program is present in 3 of the 26 countries (12%): Armenia, Azerbaijan, and Bulgaria. This is again a deficient design since a bribe-giver need not come out in the open. He could always claim that the bribe was solicited or extorted from him if detected randomly even if he in fact was the 'active' part. In many instances it will be difficult for prosecution to prove the contrary. Self-reporting should thus clearly be required also in case of solicitation or extortion in order to distinguish the victims from the culprits.[15]

The third type concedes leniency in all instances if a bribe-giver reports. Reporting is also required if the bribe was solicited or extorted from the bribe-giver (VDP III). This type of a voluntary disclosure program can be found in 16 countries (61%): China, Hungary, Iraq, Kazakhstan, Latvia, Moldova, Mongolia, Montenegro, Romania, Russia, Senegal, Serbia, Tunisia, Turkey, Ukraine and Uzbekistan. This type of a voluntary disclosure program is clearly preferred to the above types because self-reporting is necessary in all instances of active bribery and also in case of solicitation or extortion. Corrections are necessary in China and Montenegro, though. There, leniency is not granted automatically but is at the discretion of judges.

What becomes obvious, however, is that none of the countries employs a voluntary disclosure program that takes into consideration the unique nature of corrupt deals. All countries grant leniency at any stage of a corrupt deal. As pointed out in Section 2, such voluntary disclosure programs run the risk of being abused by corrupt crooks to enforce their

[14] The Chinese and the Montenegrin penal codes state that the perpetrators can be acquitted from punishment, i.e. exemption from punishment is not definite, leading to counterproductive legal uncertainty on behalf of potential whistle-blowers.

[15] Exceptions can be made in case a bribe-giver had to fear for his well-being because he was threatened with physical harm if he should report.

deals. To counter this, leniency should only be granted if the bribe was reciprocated. No country does so, though.[16]

Another interesting aspect is illustrated in Table 2. In 18 of the 26 countries (69%) that have a voluntary disclosure program for active bribery the bribe is not returned to the bribe-giver if he self-reports. In 3 countries (12%) the bribe may be returned and in 5 countries (19%) the bribe is returned to the bribe-giver if he reports.

Type of VDP / Bribe	VDP I (no. of countries)	VDP II (no. of countries)	VDP III (no. of countries)	∑ (% of total)
Bribe is not returned	3	3	12	18 (69%)
Bribe may be returned	1	0	2	3 (12%)
Bribe is returned	3	0	2	5 (19%)
∑ (% of total)	7 (27%)	3 (12%)	16 (61%)	26 (100%)

Table 2

In a voluntary disclosure program necessitating that the bribe was solicited or extorted for leniency to be conceded (VDP I) the bribe is returned in 3 countries, may be returned in 1 country and is not returned in 3 countries. In a voluntary disclosure program of the second type (VDP II) the bribe is never returned. Neither if the briber offered, promised or gave a bribe on his own accord nor if the bribe was solicited or extorted from him. In a voluntary disclosure program of the third type (VDP III), which necessitates self-reporting in any case, the majority of the countries do not return the bribe. Only in 4 countries the bribe is or may be returned.

Whether or not the bribe should be returned to a briber is a controversial issue, (Lamsdorff and Nell 2007: 13). On the one hand, returning the bribe to the giver would most likely be at odds with the public's notion of justice and fairness. Those who tried to exercise influence by illicit means and to annul fair competition should not be financially rewarded even if they show signs of sincere and active repentance through self-reporting. In fact, that this stance prevails is supported by the fact that in the majority of countries the bribe is not returned even in case of voluntary disclosure. However, from a strategic perspective one would have to take another position. If a briber were given back the bribe, his incentive to report would increase and corrupt arrangements would further be destabilized. The public's sentiments may thus not be the suitable guide for the design of anti-corruption legislation.

[16] Table I.1 in Appendix I lists the respective elements country by country.

Voluntary Disclosure Programs for Passive Bribery

Voluntary disclosure programs for passive bribery exist in Hungary, Senegal and Turkey. In all three countries leniency is granted if a public official solicits or extorts, agrees to accept or accepts a bribe. [17] This is to be supported because a public official can thus escape the trap of a long-lasting criminal career. However, from the perspective of destabilizing corrupt deals leniency should only be conceded to a public official if the bribe was actually given to him. Such a strategic destabilization element is missing in all three countries.

The bribe is confiscated in case of reporting by the public official. The rationale behind this is that the "state is considered a victim of corruption because the moneys taken by a corrupt public official legally belong to the state. The bribes taken are held, technically, in trust for the state. Therefore, the state can sue the official for the full amount of the value of the bribes he or she has received […]", (Pope 2000: 276). From the perspective of destabilizing corrupt arrangements, however, it would strengthen a public official's willingness to cheat if he could keep the bribe, (Lambsdorff and Nell 2007). Investigation of this issue is an avenue for future research.

5 Conclusion

Even though high penalties for corruption offences have a deterrent and preventive effect, they also entrap bribe-takers and bribe-givers in their corrupt relationship. Moreover, pending penalties can be misused to make threats against opportunistic behavior and can thus stabilize risky bribe agreements. Voluntary disclosure programs can be strategically applied to break the 'pact of silence' and to promote opportunism in a targeted way.

The proposed voluntary disclosure programs for acts of active and passive bribery bear the potential to destabilize corrupt deals and to lead to their collapse at the stage of initiation. This particularly holds for one-shot, large-scale transactions where corrupt actors have not established good formal and informal ties beforehand. Then the risk of opportunism and exposure is especially high. Strategic voluntary disclosure programs can increase both risks. In contrast, the suggested programs may not unfold their effects when it comes to corrupt transactions where there is long-lasting and repeated formal and informal exchange between the corrupt actors.

As the cross-section analysis shows, voluntary disclosure programs are not universally applied. And if so, they mostly relate to active bribery. Granting leniency also for acts of passive bribery is clearly the exception rather than the rule. Such an asymmetry may produce the negative effect of entrapping public officials in corrupt relationships. Moreover, strategic considerations have thus far not entered the design of voluntary disclosure programs. Consequently, corrupt actors may in many instances abuse existing voluntary disclosure programs for their malicious purposes.

Several important questions for future research remain. Labor legislation would in most instances stipulate a disciplinary transfer or dismissal of the person revealing his involvement in a corrupt deal, (Ax and Schneider 2006: 101-129). Thus, self-reporting is inhibited. Moreover, the pending risk of a transfer or dismissal can again be abused by a corrupt actor to pressure his counterpart into compliance. This especially holds for public officials who

[17] Table I.2 in Appendix I lists the respective elements country by country.

oftentimes do not have an outside option to their work in public administration. Therefore, it stands to reason that labor legislation should take into consideration some of the strategic issues discussed here. In particular, those who voluntarily disclose their offence at a certain point in time may be exempted not only from criminal proceedings but also from labor law consequences such as disciplinary transfers or dismissals.

Similarly, contracts obtained by means of bribery are oftentimes void or voidable, (Berg 2004, Schlüter 2005, Ax and Schneider 2006). Again, nullity and voidability inhibit voluntary disclosure because "the bribing party does not only lose its bribe, but also the economic advantage, the induced contract, that has been the motive for corruption", (Schlüter 2005: 233). Moreover, nullity and voidability can be abused to apply pressure on non-conforming corrupt actors, (Nell 2007). Against both backgrounds one can argue that contracts induced by bribery should be severable or valid, (Nell 2007).

Similar adverse effects may surround debarment (exclusion) as an administrative remedy available to a government that prevents or disqualifies contractors from obtaining new contracts. Voluntary disclosure as a sign of active repentance should be considered a mitigating circumstance limiting or eliminating debarment.

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Appendix I: Incorporation of Elements of Strategic Voluntary Disclosure Programs

Active Bribery			
Country	Leniency is granted in case of self-reporting	Self-reporting is required to encompass testimony	Leniency is granted only if the bribe was reciprocated
Armenia*	Yes, or if the bribe was extorted[18]	No	No
Azerbaijan*	Yes, or if the bribe was extorted	No	No
Bosnia and Herzegovina‡	Yes, but only if the bribe was extorted	No	No
Bulgaria*	Yes, or if the bribe was extorted	No	No
China* Δ	Yes	No	No
Croatia†	Yes, but only if the bribe was extorted	No	No
Czech Republic*	Yes, but only if the bribe was extorted	No	No
Hungary*	Yes	Yes	No
Iraq*	Yes	No	No
Kazakhstan*	Yes	No	No
Latvia*	Yes	No	No
Macedonia†	Yes, but only if the bribe was extorted	No	No

[18] See comments at the end of the table.

Moldova*	Yes	No	No
Mongolia*	Yes	No	No
Montenegro‡ Δ	Yes	No	No
Romania†	Yes	No	No
Russia*	Yes	No	No
Senegal*	Yes	Yes	No
Serbia‡	Yes	No	No
Slovakia*	Yes, but only if the bribe was extorted	No	No
Slovenia‡	Yes, but only if the bribe was extorted	No	No
Tajikistan*	Yes, but only if the bribe was extorted	No	No
Tunisia*	Yes	No	No
Turkey†	Yes	No	No
Ukraine*	Yes	No	No
Uzbekistan*	Yes	Yes	No
COMMENTS ON THE NEXT PAGE			

Comments:

"Yes": Leniency is granted to a bribe-giver if he reports. Reporting is required also if the bribe was extorted from him.

"Yes, or if the bribe was extorted": Leniency is granted to a bribe-giver if he reports the offering, promising or giving of a bribe or if the bribe was solicited or extorted from him. In case of extortion self-reporting is not necessary.

"Yes, but only if the bribe was extorted": Leniency is granted to a bribe-giver only if he reports and the bribe was solicited or extorted from him. No leniency if he offered, promised or gave the bribe on his own accord.

* bribe is not returned to the giver

† bribe is returned to the giver

‡ bribe may be returned to the giver

Δ exemption from punishment not automatic (discretionary)

Table I.1

Passive Bribery			
Country	Leniency is granted in case of self-reporting	Self-reporting is required to encompass testimony	Leniency is granted only if the bribe was given and not if the bribe was only promised
Hungary*	Yes	Yes	No
Senegal*	Yes	Yes	No
Turkey*	Yes	No	No

Comments:

"Yes": Leniency is granted if the bribe-taker solicits or extorts, agrees to accept or accepts a bribe.

* bribe is confiscated

Table I.2

Appendix II: List of Provisions in Penal Codes

Form	**Active Bribery**		**Passive Bribery**	
Country	Liability	Leniency Program	Liability	Leniency Program
Albania	244, 245	-	259, 260	-
Algeria	129	-	126-128	-
Argentina	258, 259	-	256, 259	-
Armenia	312, 313, 350	312 (4)	311	-
Australia	82, 99	-	82, 99	-
Austria	307	-	304	-
Azerbaijan	312	312 (Note)	311	-
Bolivia	158	-	145	-
Bosnia and Herzegovina	218	218 (3)	217	-
Bulgaria	304, 304a.	306	301, 304a.(3), 307	-
Burkina Faso	158, 160	-	158, 159	-
Burundi	303	-	300, 301, 302	-
Canada	119-121, 123 (1)	-	119-121, 123 (1), 125	-
Chile	250, 250bis.	-	248, 248bis., 249	-
China	389, 390, 392	390, 392	385, 386,	-
Colombia	407	-	405, 406	-

Costa Rica	343	-	338-341	-
Croatia	348	348 (3)	347	-
Czech Republic	161, 162(2)	163	160	-
Estonia	297, 298	-	293, 294	-
Ethiopia	437	-	423, 425	-
Finland	Chapter 13: 13, 14	-	Chapter 40: 1, 2, 3	-
Germany[19]	333, 334, 335, 336	-	331, 332, 335, 336	-
Honduras	366	-	361-365	-
Hungary	253	255/A (2)	250	255/A (1)
Iceland	109	-	128	-
India	171	-	171	-
Iraq	310, 313	311	307, 308, 309	-
Japan	198	-	197, 197-3	-
Kazakhstan	312	312 (Notes)	311	-
Kuwait	115, 117	-	114, 118, 119	-
Latvia	323	324 (1), (2)	320	-

[19] In Germany leniency is only granted if the benefit was previously authorized or is authorized by the competent public authority upon reporting. Consequently, self-reporting without the proof of prior authorization would not result in exemption from punishment. Therefore, §§ 331 (3) and 333 (3) are not counted as voluntary disclosure programs.

Macedonia	358	358 (3)	357	-
Malta	120	-	115	-
Mexico	222 (2)	-	222 (1)	-
Moldova	325	325 (4)	324	-
Mongolia	269	269 (Note)	268	-
Montenegro	424	424 (4)	423	-
Nicaragua	427	-	421, 422, 423	-
Nigeria	521 (2)	-	521 (1), 523, 525	-
Panama	162	-	160, 161	-
Peru	399	-	393, 394	-
Philippines	212	-	210, 211	-
Romania	309	309 (4), (5)	308, 310	-
Russia	291	291 (Note)	290	-
Senegal	161	160	159, 160	160
Serbia	368	368 (4)	367	-
Slovakia	161	163	160	-
Slovenia	268, 269	268 (3), 269a (3)	267	-
Sweden	Chapter 17, Section 7	-	Chapter 20, Section 2	-
Tajikistan	320	320 (Note)	319	-

Tunisia	91, 92	93	83-85, 88	-
Turkey	252	254 (2)	252	254 (1)
Ukraine	369	369 (3)	368, 370	-
Uruguay	159	-	157, 158	-
Uzbekistan	211	211	210	-

Table II.1

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